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In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF VIRGINIA, ALABAMA, IDAHO, ILLINOIS, IOWA, MICHIGAN, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, THE GOVERNOR OF RHODE ISLAND, THE GOVERNOR OF WEST VIRGINIA, AND THE STATE LEGISLATURE OF NEW JERSEY IN SUPPORT OF PETITIONERS

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BRIEF OF VIRGINIA, ALABAMA, IDAHO, ILLINOIS, IOWA, MICHIGAN, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, THE GOVERNOR OF RHODE ISLAND, THE GOVERNOR OF WEST VIRGINIA, AND THE STATE LEGISLATURE OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTERESTS OF *AMICI CURIAE*

The States of our Union have a deep and abiding interest in preserving the basic constitutional principles on which our people erected their institutions of government. Federalism and the separation of powers are two such principles. Both are implicated whenever a federal court is called upon to judge the constitutionality of a statute enacted by the people of a State. In order to uphold these principles – while fully protecting constitutional liberties – the Supreme Court has declared a cardinal rule: a federal court must not declare a State statute unconstitutional if there is any fair interpretation of the statute by which it can be saved. It is to preserve this rule – and the constitutional principles it embodies – that these States and State officials submit this brief as *amici curiae*.[1]

SUMMARY OF ARGUMENT

From the earliest days of the Republic, this Court has sought the meaning of statutes in light of this broad principle: that legislative acts of the sovereign must be construed, whenever possible, to avoid conflicts with the law to which the sovereign is bound. It is a principle that

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[1] Pursuant to Rule 37.3, counsel for the Petitioners and the Respondent have given written consent to the filing of this *amicus curiae* brief. Copies of the consent letters have been filed with the Clerk.

has been explicated in increasing detail as circumstances warranted. First applied to a potential conflict between federal and international law, the principle was soon expanded to cover federal statutes and the federal constitution. The Court next applied the principle to cover State statutes challenged for alleged constitutional violations and then extended the principle so as to avoid not only manifest unconstitutionality, but also grave doubts about the constitutionality of a statute. Recently, the Court has provided more detailed examples of the analysis that federal courts should follow in trying to save a statute from unconstitutionality.

The mandate of the rule is beyond debate, but not beyond misapplication. In the case at bar, the Eighth Circuit acknowledged the rule, then proceeded to disregard it, striking down Nebraska's ban on partial birth abortions even though that State offered a statutory interpretation that avoided constitutional danger. The court of appeals read the statute to ban conventional abortion procedures. Yet, by Nebraska's reading of its law, only dilation and extraction ("D&X") abortions are prohibited. This Court should accept Nebraska's interpretation of its law, as presented by its Attorney General, and reverse the judgment of the court of appeals.

The Nebraska case is not, however, the only occasion on which federal courts have declared statutes unconstitutional despite the availability of narrowing constructions. Other States have experienced similar treatment of their laws, especially in the area of abortion. The *Amici* urge this Court to restate its cardinal rule in terms so explicit as to admit no possible misunderstanding. Specifically, the *Amici* urge this Court to adopt the following two corollaries:

> **First proposed corollary:** When a federal court construes a State statute that has not been authoritatively construed by the courts of that State, the federal court shall not reject a proffered interpretation that would avoid constitutional problems, unless the interpretation is one that is not susceptible to debate among reasonable jurists.
>
> **Second proposed corollary:** When a federal court construes a State statute that has not been authoritatively construed by the courts of that State, the federal court shall not reject an interpretation advanced by the State, if certification to the State's highest court is available to test the proffered interpretation.

ARGUMENT

THE CARDINAL RULE OF CONSTRUCTION: ITS ORIGIN AND DEVELOPMENT

Stated in its most general terms, the principle at issue in this case is that legislative acts of the sovereign must be construed, whenever possible, to avoid conflicts with the law to which the sovereign is bound. The principle received its first formulation from Chief Justice John Marshall in a case involving international law. "[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804). Just as the sovereign is subject to the law of nations, so too are federal and State governments – each sovereign in its own sphere – subject to the Constitution. Thus, the basic principle recognized in the *The Charming Betsy* was soon applied to purely domestic cases. In construing an early federal statute, this Court said, "No court ought, unless the terms of the act rendered it **unavoidable**, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. 433, 448-49 (1830) (emphasis added). Again, in

United States v. Coombs, 37 U.S. 72, 76 (1838), this Court wrote:

> If a section of an act of congress admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress; it is the duty of the Supreme Court to adopt the former construction: because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority; unless that conclusion is forced on the Court, by language **altogether unambiguous**.

(Emphasis added).

It is not only acts of Congress that have the benefit of this rule. The same logic applies to acts of State legislatures, a point firmly imbedded in constitutional jurisprudence well before the end of the 19th century. *Grenada County Supervisors v. Brogden*, 112 U.S. 261 (1884), was a diversity action involving the interpretation of a Mississippi statute in light of limitations imposed by the constitution of that State. Relying on precedent from Mississippi and other States, as well as general constitutional principles, this Court embraced a "duty to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution." *Id.* at 269. Soon thereafter, this Court decided *Presser v. Illinois*, 116 U.S. 252 (1886), a case that turned upon the interpretation of State law in light of federal constitutional limitations. The issue was whether an Illinois statute conflicted with acts of Congress for the organization of the militia. Finding no conflict, this Court said "it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and paramount law." *Id.* at 269. What was a "rule of construction" in *Presser* was elevated to an "elementary rule" in

Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."). And what was an "elementary rule" in *Hooper* was further elevated to a "cardinal rule" in *Knights Templars' & Masons' Life Indem. Co. v. Jarman*, 187 U.S. 197, 205 (1902).

Notwithstanding the preeminence of the rule, the formulation in *Knights Templars* was somewhat less emphatic than in earlier and later decisions by this Court. The Court said that "where the language of an act will bear two interpretations, **equally obvious**, that one which is clearly in accordance with the provisions of the constitution is to be preferred." *Id.* (emphasis added). Standing alone, *Knights Templars* might be read to suggest that a court is to choose a constitutional interpretation over an unconstitutional one only if the former is at least as obvious as the latter. But that would misread the rule. While such "parity" between competing interpretations is a **sufficient** circumstance for the rule to apply, it is not a **necessary** one. Shortly after *Knights Templars*, the Court decided *United States v. Delaware & Hudson Co.*, 213 U.S. 366 (1909), and cited *Knights Templars* as authority for the following formulation:

> It is elementary when the constitutionality of a statute is assailed, if the statute be **reasonably susceptible** of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.

Id. at 407, citing *Knights Templars*, 187 U.S. at 205 (emphasis added).

Thus, in order to merit adoption, the constitutional interpretation need not be "equally obvious" with the unconstitutional one. It need only be an interpretation to

which the statute is "reasonably susceptible." *Delaware & Hudson* also recast the rule in a way that extended it to cases where the unconstitutionality of one interpretation was not definite, but only a matter of grave doubt:

> [T]he rule plainly must mean that where a statute is susceptible of two constructions, by one of which **grave and doubtful** constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

Id. at 127 (emphasis added).

This expansion of the rule was underscored in a long line of cases that extended into the early 1930s.[2] In 1932, the Court decided *Crowell v. Benson*, 285 U.S. 22 (1932), a case involving the constitutionality of a federal statute that vested commissioners – rather than federal judges – with the power to make certain decisions about workers' compensation cases. The Court invoked the rule by a formulation that reaffirmed three of its salient features: "even if a **serious doubt** of constitutionality is raised, it is a **cardinal principle** that this Court will first ascertain whether a construction of the statute is **fairly possible** by which the question may be avoided." *Id.* at 62 (emphasis added). By so formulating the rule, the Court implicitly rejected a competing formulation advanced by the dissent, which used the approach suggested by an overly narrow reading of *Knights Templars*. The dissent took issue with the majority's construction, saying that the statute "is not equally susceptible to two constructions." *Id.* at 76. By contrast, the majority asked only whether a saving construction is "fairly possible" and whether the

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[2] *See, e.g., United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Bratton v. Chandler*, 260 U.S. 110, 114 (1922); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929).

statute is "open" to such a construction. *Id.* at 62 (majority opinion). This formulation of the rule continued to be invoked by the Court. *See, e.g., International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979).

In a series of First Amendment cases beginning in the mid-1970s, the Court used a somewhat different formulation. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), involved a city ordinance that prohibited showing films containing nudity at a drive-in movie theater when its screen is visible from a public place. The Court was concerned that a "demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights." *Id.* at 216. Yet, it also recognized that facial challenges must be approached with "caution and restraint" because "invalidation may result in unnecessary interference with a state regulatory program." *Id.* The Court said that "in accommodating these competing interests the Court has held that a State statute should not be deemed facially invalid unless it is not **readily subject** to a narrowing construction by the state courts. . . ." *Id.* (emphasis added). This formulation suggests three questions. First, in assessing the availability of a constitutional construction, how does the term "readily subject" square with the more familiar term "fairly possible"? Second, assuming *arguendo* that the two terms mean different things, does the newer term displace the old one altogether, or does it have an application limited to First Amendment cases? Third, does use of the term "readily subject" in conjunction with the reference to "state courts" suggest that some different or additional principle may be at work when the statute at issue is one of State, rather than federal law?

Answers to these questions were suggested – though not definitively given – by a trio of cases decided in 1988,

all dealing with the First Amendment. In January of that year, the Court decided *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), a case involving a State statute that prohibited the display of materials "harmful to juveniles." The Court said:

> It has long been a tenet of **First Amendment law** that in determining a facial challenge to a statute, if it be "**readily susceptible**" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The key to application of this principle is that the statute must be "**readily susceptible**" to the limitation; **we will not rewrite** a state law to conform it to constitutional requirements.

Id. at 397 (emphasis added).

On the one hand, this passage suggested that the "readily susceptible" test might apply only in the special context of the First Amendment, and not displace the "fairly possible" test in other contexts. On the other hand, by juxtaposing "readily susceptible" with the extreme alternative of "rewrit[ing] a state law", the Court left open the question of how much more restrictive, if at all, the "readily susceptible" test might be.

The second case to be decided was *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). This case did not deal with a State law, but with a federal statute, 29 U.S.C.A. § 158(b)(4)(ii)(B), making it an unfair labor practice for a labor organization to threaten, coerce or restrain any person to cease doing business with another person. The question was whether the statute covered peaceful distribution of certain leaflets at a mall entrance urging customers not to shop there. The National Labor Relations Board had ruled that the federal statute banned such

leafleting; however, in order to avoid "serious questions" of constitutionality, the Court gave it a narrower interpretation that allowed the leafleting to occur. In so doing, the Court did not invoke the phrase "readily susceptible" nor did it cite *Erznoznik* or *American Booksellers*, even though the latter case was decided only four months earlier. Instead, the Court invoked ten other cases stretching from the 1804 decision in *The Charming Betsy* through the 1979 decision in *Catholic Bishop*. In so doing, it presented two formulations of the "cardinal principle," a principle the Court declared "beyond debate." The Court first said: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems **unless such construction is plainly contrary to the intent of Congress.**" 485 U.S. at 575 (emphasis added). Later on the same page, the Court quoted its 1895 decision in *Hooper* for the proposition that "**every reasonable construction** must be resorted to, in order to save a statute from unconstitutionality." 485 U.S. at 575 (emphasis added). By implicitly equating these two formulations of the cardinal rule, *DeBartolo* gave additional meaning to the term "reasonable construction." A proposed construction of a federal statute is reasonable unless it is "plainly contrary to the intent of Congress."

The different approaches in *American Booksellers* and *DeBartolo* appeared to suggest that the "readily susceptible" terminology was not only limited to First Amendment cases, but to First Amendment cases involving State statutes. The same divergent approach was suggested by *Frisby v. Schultz*, 487 U.S. 474 (1988), decided two months after *DeBartolo*. In saving a local ordinance prohibiting residential picketing, the Court reverted back to the terminology used in *Erznoznik* and *American Booksellers*, holding that "the ordinance is **readily subject** to a

narrowing construction that avoids constitutional difficulties." *Id.* at 482 (emphasis added).

Despite the diverging applications suggested in 1988, a 1997 decision gave a unified formulation. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court considered a First Amendment challenge to portions of the Communications Decency Act ("CDA"), 47 U.S.C.A. §§ 223(a)(1) and (d). This federal statute prohibited the knowing transmission to minors of "indecent" or certain "patently offensive" communications. Drawing upon *Erznoznik* and *American Booksellers*, both State statute cases, the *Reno* Court said it "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." 521 U.S. at 884. This eliminated any previously implied distinction between First Amendment challenges to State and federal statutes. Moreover, the Court distinguished its criticism of the "open-ended" CDA from "those [cases] in which [the Court has] construed a statute narrowly because the **text** or **other source of Congressional intent** identified a clear line that this Court could draw." *Id.* (emphasis added). By expressly endorsing these two methods of discerning legislative intent, the Court also appeared to close any gap between free speech cases and cases involving other constitutional guarantees. Thus, in any constitutional challenge, federal courts are to use the **text** of a statute to discern legislative intent and, where possible, a narrowing construction. Where a narrowing construction cannot be grounded in a textual approach, **other sources** of legislative intent can still supply the rationale for narrowing. This focus on sources of legislative intent is the other side of the same coin used in *DeBartolo*, which said a court is to adopt a narrowing construction "unless plainly contrary" to legislative intent. 485 U.S. at 575. *Reno* also repeated the admonition

that courts "will not rewrite a law to conform it to constitutional requirements." 521 U.S. at 884-85, quoting *American Booksellers*, 484 U.S. at 397 (quotation marks omitted). But, by juxtaposing this admonition with its approval of "the text or other source of Congressional intent," the Court implicitly limited the admonition to cases where such sources provide no basis for a narrowing construction.

Brought to this point, the cardinal rule may be summarized as follows: federal courts must not construe a statute in a way that leaves doubts about its constitutionality, if the text or other source of legislative intent furnishes the basis for a narrowing construction that will avoid those doubts. It is a rule applicable to statutes generally, including State statutes dealing with abortion. *See, e.g., Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 441 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983).

Finally, lest there be any doubt about Nebraska jurisprudence, the Supreme Court of that State likewise has a practice of construing statutes to avoid constitutional difficulty. Nebraska courts are "required to construe a penal statute so as to give it an interpretation which meets constitutional requirements if such can reasonably be done." *State v. Kipf*, 450 N.W.2d 397, 403 (1990); *accord State v. Garza*, 496 N.W.2d 448, 454 (1993). If a statute is "susceptible to more than one reasonable construction, a court uses the construction that will achieve the statute's purpose and preserve the statute's validity." *Ehler's v. Perry*, 494 N.W.2d 325, 334 (1993). Unfortunately, the Nebraska courts never had the chance to apply these canons to the law of their State, and the Eighth Circuit utterly failed to do so, just as it failed to apply the cardinal rule of this Court.

APPLICATION OF THE RULE TO THE NEBRASKA STATUTE

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

This observation by an eminent jurist should be borne in mind in approaching this case, which turns on the meaning of the words used by Nebraska in writing its statute banning partial birth abortion. "Partial birth abortion" is defined in the statute as:

> an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a **substantial portion** thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Neb. Rev. Stat. § 28-326(9) (1998) (emphasis added).

The Eighth Circuit construed the Nebraska statute to ban dilation and evacuation ("D&E"), the most common abortion method in the second trimester. So construed, the statute was held to impose an "undue burden on a woman's right to choose to have an abortion" and was thus declared unconstitutional. *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (1999).[3] In reaching this conclusion, the court said the "crucial problem" was the term "substantial portion," which "is nowhere defined in the statute." *Id.* at 1150. More specifically, the question was how much of the unborn child must be delivered into the vagina before the "substantial portion" element is met. The court made no effort to construe this term – or any other statutory term – in light of Nebraska law. The Attorney General of Nebraska said the child must be delivered up to his head, as is done in the D&X procedure that the statute targets. The court of appeals rejected this interpretation without analysis. It concluded that fetal arms or legs qualify as a "substantial portion" and that, because such delivery of limbs occurs in many D&E abortions, the Nebraska statute sweeps too broadly to be constitutional.

In reaching its decision, the Eighth Circuit acknowledged the cardinal rule of statutory construction, then turned around and ignored it. It first said, "In interpreting the statute, it is our duty to give it a construction, if **reasonably possible**, that would avoid constitutional doubts." *Id.* (emphasis added). Yet, only a few sentences later, the court abandoned this standard and baldly declared: "if 'substantial portion' means an arm or a leg – **and surely it must** – then the ban created by [the Nebraska statute] encompasses both the D&E and the D&X procedures." *Id.* (emphasis added). Similarly, it declared that it "agree[s] with the District Court's assessment that in any **sensible and ordinary** reading of the word, a leg or arm is 'substantial.' " *Id.*, quoting *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1129 (D. Neb. 1998)

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[3] Since the Eighth Circuit did not reach other aspects of the decision by the district court, the *Amici* will not address those issues, other than to note their view that, properly construed, the Nebraska statute should survive scrutiny there as well.

(emphasis added; internal quotation marks omitted). The inconsistency is obvious. Identifying the "sensible and ordinary" meaning of a word is a fundamentally different task than deciding whether an interpretation is "reasonably possible" in the context of a particular statute. The court of appeals should have followed Justice Holmes by looking for the "living thought" beneath the words at issue. Instead, it treated those words as "transparent and unchanged." This was error.

If the court of appeals had adhered to the cardinal rule of construction, it would have adopted the interpretation advanced by the Attorney General of Nebraska. Under the approach approved in *Reno*, the court should have examined both the "text" of the Nebraska statute and "other sources" of legislative intent. 521 U.S. at 884. Both of these sources identify a clear line between the D&X procedure, which is prohibited, and the D&E procedure, which is allowed.

The Textual Approach Supports A Narrow Reading.

The Nebraska Supreme Court has recognized that the word "substantial" has a broad range of possible meanings. *See, e.g., George A. Hormel & Co. v. Hair*, 426 N.W.2d 281, 284 (1988) (" 'Substantial' has been defined to mean 'material,' 'important,' 'massive,' or 'considerable in amount.' ") (citation omitted). It has also recognized that the meaning to be attached to the term depends on context, and that the term can mean what the State contends it means here – "almost all of" something. *See, e.g., Jones v. Elliott*, 108 N.W.2d 742, 748 (1961) ("substantial performance" of a construction contract is a close "approximation to complete performance"). This alone is enough to rebut the Eighth Circuit's unsupported conclusion that a "substantial portion" of an unborn child "surely" means something less than delivery up to the head.

Nebraska's interpretation of its statute is also supported by returning the disputed words to the place where they are found and examining them there in the light of the applicable canons of construction. As this Court has recognized, one such canon is "to give effect, if possible, to every word." *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979). The same familiar canon applies in Nebraska. *Richardson v. Board of Education*, 290 N.W.2d 803, 807 (1980) ("We must presume that the Legislature intended every provision of the statute to have a meaning."); *accord, State v. Glover*, 325 N.W.2d 155 (1982). What meaning does the word "substantial" bring? In order to answer this question, it is helpful to consider the statute as it would appear with "substantial" omitted. In such a case, the law would still not be violated unless, *inter alia*, the portion of the child "deliver[ed] into the vagina" were capable of being the subject of "a procedure that the person performing such procedure knows will kill the unborn child." When such a hypothetically abbreviated statute is analyzed by a textual approach, fetal limbs alone would arguably qualify because, by their disarticulation, a physician could kill the fetus and, as the record shows, this is a recognized procedure.[4] But, there is no recognized procedure in which a physician draws into the vagina a fetal part *smaller* than a limb for the purpose of performing a fatal procedure. When the word "substantial" is added, it must bring added meaning. It

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[4] Some States adopted partial birth abortion bans based on the 1995 federal model, rather than the 1997 federal model that introduced the words, "substantial portion." While those earlier States would not have the benefit of the same textual argument made here, they have other textual arguments, as do States using the 1997 model. All of these statutes also have the benefit of a narrowing construction based on legislative intent.

requires the delivery of a greater portion of the child than would be required without that additional term. Thus, more than fetal limbs must be delivered.

More, but how much more? And, why is Nebraska correct to say that the child must be delivered up to its head? A persuasive answer can be found in the circumstances of fetal anatomy and abortion practice. First, the fetal torso is an anatomical feature having far greater girth than fetal limbs and requiring significantly more cervical dilation to deliver. If the cervix has sufficiently dilated to permit a portion of the torso to be drawn through the cervix, the rest of the torso follows easily. Second, there is no evidence of any abortion technique in which the physician pauses *mid-torso* to perform the procedure that will kill the child. Even if there may be rare circumstances where a different result occurs, it is reasonable to judge the **meaning** of "substantial" based on the **typical and ordinary** circumstances, not the extraordinary ones.[5] Thus, analyzing the text of the statute supports the reasonableness of the interpretation offered by Nebraska.

Other Sources of Legislative Intent Support A Narrow Reading.

The courts are not confined, however, to a textual approach. As *Reno* shows, other sources of legislative

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[5] Similarly, even if the Respondent could speculate about some hypothetical procedure in which a physician would pause mid-torso to deliver the lethal blow, that is not enough. A plaintiff cannot "have a regulation wiped off the books . . . merely by showing that it will be impermissibly vague in the context of some hypothetical application." *Sweet Home Chapter of Comm. for a Greater Oregon v. Babbitt*, 1 F.3d 1, 4 (D.C. Cir. 1993).

intent can also draw "a clear line" in interpreting the sweep of a statute. Nebraska courts consult the legislative purpose, and place on the statute a "construction that best achieves the statute's purpose." *Willers v. Willers*, 587 N.W.2d 390, 394 (1998); *Brown v. Wilson*, 567 N.W.2d 124, 128 (1997). The public record surrounding passage of the Nebraska statute – as well as the public history of these times – leads to the conclusion that the Nebraska legislature's purpose was to ban only the D&X procedure.

The intent of the Nebraska legislature is confirmed by examining the history of the federal legislation on which the Nebraska statute is based.[6] In 1995 and 1997, Congress passed legislation to ban partial birth abortions. Although both bills were vetoed by the President, they served as models for similar legislation by the States. Passed in 1997, the Nebraska statute was modeled on the 1997 version of the federal bill.[7] It is, therefore, reasonable to infer that the Nebraska legislature intended to

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[6] The *Amici* will not duplicate Nebraska's discussion of its own legislative history, but wish to make the point that the history of the federal model is a sufficient basis on which to find legislative intent for Nebraska's statute as well as for all other State statutes based on the federal legislation.

[7] The federal bill gave the following definition:

> (b)(1) . . . "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.
>
> (3) " . . . vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.

H.R. 1122, 105th Cong., 1st Sess. (1997).

address the same problem as Congress. The legislative history of the federal bill is useful in ascertaining the legislative intent underlying the State version.

In its report on the 1997 bill, the Judiciary Committee of the U.S. House of Representatives explained that the purpose of the federal legislation is to prohibit the D&X procedure. H.R. Rep. No. 105-24 (1997) ("the Report"). In describing "partial birth abortion," the Report quoted a presentation about D&X by Dr. Martin Haskell, an inventor of the procedure. That presentation included Dr. Haskell's discussion about how much of the unborn child is to be delivered into the vagina before the lethal blow is delivered:

> [Using forceps] the surgeon reliably grasps a lower extremity . . . and pulls the extremity into the vagina . . . . With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. **The skull lodges at the internal cervical os.** At this point [holding the fetus in place] the surgeon then forces the scissors into the base of the skull or into the foramen magnum. . . .

Id. at 3, quoting Martin Haskell, M.D., "Dilation and Extraction for Late Second Trimester Abortions" (1992) (emphasis added).

No abortion technique other than the Haskell D&X was described by the Report as falling into the category of "partial birth abortion."[8] Since it was clearly the

[8] One could conceive of variations of the D&X that the statute would also ban (*e.g.*, killing by lethal injection, instead of brain suction). Such potential variations do not figure in this case or current abortion practice and need not be distinguished from the Haskell D&X. Such potential variations are subsumed here under the term "D&X."

legislative intent to ban the D&X procedure, and since that procedure clearly requires delivery of the child up to its head, it is reasonable to construe the words "substantial portion" as being met in the federal bill only when the child has been so delivered. And, since the State law mirrors the federal bill, it is likewise reasonable to say that the words at issue here require delivery of the child up to his head.

This approach compares favorably with the one used in *United States v. Grace*, 461 U.S. 171 (1983). At issue there was a federal statute, 40 U.S.C.A. § 13k, that prohibited picketing and leafleting on the grounds of the Supreme Court. The grounds were defined to encompass the entire block on which the Supreme Court building is located, bounded by the curbs of the bordering streets. 40 U.S.C.A. § 13p. Thus, while no separate mention was made of sidewalks, the statute was drawn in terms so broad as to encompass them by a literal reading of its terms. Treating sidewalks as a traditional public forum, this Court held that § 13k was unconstitutional insofar as it banned picketing and leafleting occurring there. Yet, the entire statute was not struck down; it was only invalidated as applied to the sidewalks. Even without a textual basis, the Court was able to use legislative intent to draw a dividing line across a plot of ground. Legislative intent should likewise be a sufficient basis on which to draw a dividing line across the body of a fetus. Moreover, the Nebraska statute's use of "substantial portion" provides a textual basis for line-drawing wholly missing in *Grace*. Thus, the Court should simply decide that the Nebraska statute does not apply when only arms and legs are delivered. It only applies when the child has been delivered up to its head. It bans the D&X, not the D&E.

In sum, both the "text" of the Nebraska statute and "other source[s] of [legislative] intent identif[y] a clear

line that this Court could draw." *Reno*, 521 U.S. at 884. Of course, the task of line-drawing here is one more properly performed by the Supreme Court of Nebraska.[9] As for their part, federal courts should "assume . . . that a state court presented with a state statute specifically governing . . . abortion . . . procedures will attempt to construe the statute consistently with constitutional requirements." *Akron*, 462 U.S. at 441.

FUTURE OF THE RULE: TWO PROPOSED COROLLARIES

For this Court to accept the narrowing construction offered by Nebraska – and to reverse the court of appeals – are the only actions needed to resolve the present controversy. That can be done quite concisely. But, the Court should consider doing more. The failure of the court of appeals to abide by the cardinal rule in the case at bar is not an isolated occurrence. Other federal courts have committed similar errors. Indeed, "[f]ederal courts have always struggled to say how far they should go in defining state statutes so they are constitutional." *Eubanks*

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[9] There is no reason to believe that the Nebraska court would ignore its own canons of construction, or that there is some other obstacle to its arriving at a perfectly plausible construction of "substantial portion" that would eliminate or narrow federal constitutional questions by excluding D&E from the statute's reach. *See, e.g., State v. Burke*, 408 N.W.2d 239, 246 (1987) (saving statute from First Amendment overbreadth challenge by rejecting construction of a term that would cause statute to reach protected conduct); *cf. Central States Found. v. Balka*, 590 N.W.2d 832, 839 (1999) (although statute lacks explicit procedural requirements, "we read the statute as including the procedural requirements necessary to satisfy the Fourth Amendment.").

v. Stengel, 28 F. Supp. 2d 1024, 1037 (W.D. Ky. 1998), *appeal docketed*, No. 98-6671 (6th Cir. Dec. 11, 1998). This case provides an excellent opportunity for the Court to give additional guidance on how the rule is to be applied.

Nowhere is the failure to adhere to the rule more evident than in cases dealing with the sensitive and profound issue of abortion. One example of such a failure is found in *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998), where the Sixth Circuit struck down Ohio's ban on the D&X procedure. As suggested by the dissenting judge, the majority not only disregarded the cardinal rule of construction, but turned the rule on its head, "strain[ing] to interpret" the statute "so as to make the burden . . . appear 'undue' in violation" of Supreme Court precedent. *Id.* at 212. One commentator described the decision this way:

> Directly contradicting Supreme Court precedent, the *Voinovich* court failed to seek a constitutional interpretation of the D&X ban. Rather than adopting a consistent method of statutory interpretation, the court repeatedly changed its interpretive position in order to push the law toward unconstitutionality.
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> * * *
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> The Sixth Circuit crafted an opinion unconstrained by the Supreme Court's "cardinal principle" or any other standard of statutory interpretation. Rather, the opinion's only consistent interpretive principle is that standards of interpretation are selectively and temporarily employed and rejected to flout the Supreme Court's mandate and find the statute unconstitutional.

Comment, 112 Harv. L. Rev. 731, 734, 736 (1999).

Other courts have struck down partial birth abortion statutes based on a cramped understanding of their mandate to adopt narrowing constructions whenever possible. A leading example is *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998), *appeal docketed*, No. 99-5042 (3d Cir. Feb. 2, 1999), a case that vividly illustrates the need for additional guidance. In striking down the New Jersey partial birth abortion ban, the court acknowledged the cardinal rule, but mistakenly believed that it applies only in "close cases." *See id.* at 486. This mistake was apparently engendered by that court's misreading of *Chapman v. United States*, 500 U.S. 453 (1991). *Chapman* provides no guidance on how far a court may go in accepting a State's construction of its statute before it ventures into the forbidden ground of rewriting it. That guidance was provided by *Reno*, 521 U.S. at 884-85. The *Verniero* court acknowledged *Reno*, but only took note of the "readily susceptible" term found there without recognizing the broad use of text and other sources of legislative intent that *Reno* authorizes within the scope of that term.

Additional guidance is also needed to prompt federal courts to entrust decisions about State law to State courts through use of certification. In *Eubanks*, for example, Kentucky asked the district court to certify its partial birth abortion statute to the Kentucky Supreme Court for a definitive ruling about its meaning. The district court refused, based on its failure to discern a limiting construction to which the statute was "obviously susceptible" and a reluctance to entrust to the State courts a decision that might resolve the entire case. 28 F. Supp. 2d at 1038 n.17.

The "Reasonable Jurist" Corollary

The *Amici* respectfully suggest that the failure to adhere to the rule arises, in part, from an insufficient

focus on the proper role of the federal judiciary in dealing with the meaning of State law. When dealing with federal law – including the federal constitution – "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). And, by the same logic, it is the province and duty of the **State** judiciary to say what the **State** law is. Thus, where a State's highest court has declared what State law means, federal courts may not say otherwise. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."); *Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 1861 (1999) ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."). By the same token, where a State's highest court has not yet construed a State statute, it is not the task of the federal courts to displace or preempt that State tribunal by **declaring** what the statute means. Instead, it is the federal court's role to make a **predictive** judgment about how State courts may interpret their own State law. In making this judgment, the federal court should "assume . . . that a state court . . . will attempt to construe the statute consistently with constitutional requirements." *Akron*, 462 U.S. at 441.[10] Accordingly, a federal court should not conclude that the State court would fail in this endeavor **unless** there is simply no saving construction that a reasonable jurist could reach. In sum, the basic principles previously recognized by this Court give rise to the following corollary, which the *Amici* respectfully urge this Court expressly to adopt:

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[10] For Nebraska rules on achieving constitutional constructions, *see supra* at 11.

When a federal court construes a State statute that has not been authoritatively construed by the courts of that State, the federal court shall not reject a proffered interpretation that would avoid constitutional problems, unless the interpretation is one that is not susceptible to debate among reasonable jurists.

This corollary would promote adherence to the Court's cardinal rule by stating more expressly what the focus of federal courts must be when confronted with a constitutional challenge to a new State law. The question is not what **they** believe the State law means, but whether a proposed interpretation is one that is open for their State counterparts to adopt. The "reasonable jurist" test is not new in the law. An analogous approach has been used in *habeas corpus* jurisprudence since *Butler v. McKellar*, 494 U.S. 407 (1990) and *Sawyer v. Smith*, 497 U.S. 227 (1990).[11] The issue is not whether the jurist would have been right or wrong to make a particular ruling on the law, but whether that ruling was open to debate. Similarly, when a federal court is presented with a narrowing construction of a new State law, its task is not to decide whether that construction is right or wrong, but whether it is subject to debate among "reasonable minds" or "reasonable jurists." If so, then the federal court must presume that

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[11] There, the "reasonable jurist" test is part of the non-retroactivity doctrine. Under *Teague v. Lane*, 489 U.S. 288, 310 (1989), "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." As the Court has explained, "[a] rule is 'new' for *Teague* purposes whenever its validity under existing precedent is subject to debate among 'reasonable minds' or among 'reasonable jurists.' " *Wright v. West*, 505 U.S. 277 (1992), quoting *Butler*, 494 U.S. at 415, and *Sawyer*, 497 U.S. at 234.

the State court would adopt that construction – or some better one – in order to save the statute from unconstitutionality.

In the case at bar, it was clear error for the Eighth Circuit not to adopt – or even consider – the narrowing construction of the Nebraska statute offered by the Attorney General of that State. It is an error that might well have been avoided – and that would be more easily avoided in the future – if the cardinal rule of construction were stated as directly as the first corollary the *Amici* now propose. The *Amici* respectfully request the Court to adopt that corollary.

The "State Certification" Corollary

The first corollary proposed by the *Amici* would clarify the rules of **substantive** decision-making by federal courts. The second proposed corollary addresses the **procedure** for interpreting State statutes. Reviewing the constitutionality of a State statute is one of the gravest duties that can be undertaken by a federal court. It is especially so when that review leads to a conflict between the court and the State as to the *meaning* of the statute. At one end of the courtroom sits the federal judge, embodying the weight and authority of the United States government. At the other end stands the Attorney General, representing the State government whose statute is under attack. The State government says to the federal that the State law means *this*. And the federal government responds by telling the State that it is wrong about its own statute, and that its law means *that*. We all must "pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). Such a conflict between the two governments – each sovereign in its own sphere – is a spectacle that ought to be assiduously avoided. In the

interests of avoiding such conflicts, the *Amici* also propose the following corollary to the cardinal rule of construction:

> **When a federal court construes a State statute that has not been authoritatively construed by the courts of that State, the federal court shall not reject an interpretation advanced by the State, if certification to the State's highest court is available to test the proffered interpretation.**

Such an approach would defuse the conflict – and avoid "friction-generating error" – by shifting the dispute over State statutory interpretation into a State forum. *Arizonans*, 520 U.S. at 79. Whether the State court accepted or rejected the Attorney General's view about the meaning of the State statute, the State would then be the master of its own house.[12] Thus, concerns about comity and federalism would no longer be implicated. On the

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[12] While certification proceedings were pending, the federal court could provide plaintiffs with any necessary protection by a preliminary injunction preventing enforcement of the statute in a manner inconsistent with the proffered interpretation. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 312 n.18 (1979); *Harrison v. NAACP*, 360 U.S. 167, 179 (1959). Of course, "there is no reason to suppose that . . . assurances [given to the Court by state officials concerning the limited scope of the statute] will not be honored by these or other [state] officials not parties to [the] litigation." *Id.* As a result, in most cases there will be no basis for the kind of "precautionary injunction" issued by the Seventh Circuit in *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (*en banc*). Indeed, it is a violation of federalism to assume that state officials will adopt and enforce an unconstitutional interpretation of the statute. *Richmond Medical Ctr. For Women v. Gilmore*, 144 F.3d 326, 332 (4th Cir. 1998) (Luttig, J.) (single judge).

other hand, if the State court declined to hear the case, the State would at least have had the opportunity to have construed its own law. Thus, even if the federal court thereafter reached an unfavorable conclusion about the statute, concerns about comity and federalism would be sharply reduced.[13]

As this Court has already recognized, federal courts have authority to certify questions of State law on their own motion. *E.g., Elkins v. Moreno*, 435 U.S. 647, 662 (1978); *Massachusetts v. Feeney*, 429 U.S. 66 (1976). Forty-seven States – including Nebraska – now have certification procedures in place.[14] Neb. Rev. Stat. Ann. § 24-219. While the Court has not yet called for certification in the same terms suggested by the *Amici*, the proposed corollary represents a logical extension of the guidance previously announced by the Court. That guidance is found in various statements that – like the proposed corollary –

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[13] Nevertheless, where the State's highest court has declined to accept certification from a federal district court, the same opportunity should be again provided by any federal appellate court that might be inclined to reject the Attorney General's interpretation. This is so not only because the district court's subsequent decision on the merits may make acceptance of certification more compelling, but also because the State's highest appellate court may prefer to limit the cases it accepts to those certified by another appellate court. *See, e.g., Virginia Soc'y for Human Life v. Caldwell*, 152 F.3d 268 (4th Cir. 1998) (describing acceptance of certification by Virginia Supreme Court when request received from court of appeals, despite earlier rejection of certification request from federal district court).

[14] *See* Schneider, "But Answer Came There None": The Michigan Supreme Court and The Certified Question of State Law, 41 Wayne L. Rev. 273, 275-277 n.1. (1995) (listing forty-three states with certification procedures); Cal. Rules of Ct. Div I R 29-5 (1999); 477.004 R.S.Mo (1999); N.J.Ct.R. 2:12 A (1999); In Re: Certification of Questions of Law (Order) (S. Ct. of Pa. Jan. 12, 2000).

aim at avoiding clashes between State and federal governments, while facilitating an accurate resolution of the constitutional challenge. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Arizonans*, 520 U.S. at 79 (quoting *Brockett v. Spokane Arcades*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) (other citation omitted). *See also, e.g., American Booksellers*, 484 U.S. at 395 (case remanded for certification "where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read" in a narrower way than plaintiffs propose); *Zant v. Stephens*, 456 U.S. 410, 416 (1982) ("Suffice it to say that the state-law premises of the Georgia Supreme Court's conclusion of state law are relevant to the constitutional issue at hand."); *Arizonans*, 520 U.S. at 77, 79 (certification warranted if it would " 'greatly simplify' an ultimate adjudication in federal court") (citation omitted); *Fiore v. White*, 528 U.S. ___, 120 S. Ct. 469, 473 (1999) (State Supreme Court's answer to certified question "will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case."). As this Court has also recognized, a State's proffer of a narrowing construction is important or even decisive evidence of the statute's susceptibility to it. *E.g., Arizonans*, 520 U.S. at 77-78; *American Booksellers*, 484 U.S. at 394-97; *Bellotti v. Baird*, 428 U.S. 132, 143-45 (1976).

There is no sign in the Eighth Circuit's remarkably brief opinion of the slightest interest in what Nebraska courts would have to say about the Nebraska statute. With a dismissive wave of a judicial hand, the court simply announced its own unsupported view that the Nebraska statute "surely" prohibits D&E abortions. Our

Federalism does not permit such cavalier treatment of a new State statute. This Court should correct that grave constitutional error by giving the statute an appropriate narrowing construction or, alternatively, by certifying the question of the statute's proper construction to the Nebraska Supreme Court. In either case, adoption of the proposed corollary would avoid such infringements in the futu e.

CONCLUSION

We live under a constitutional framework that not only divides power among three branches of government, but also between two levels of sovereignty: federal and state. The preservation of that framework depends in no small measure upon the restraint and balance exercised by federal courts when called upon to decide constitutional challenges to State statutes. The cardinal rule of statutory construction – saving statutes whenever possible – is a reflection of the need for restraint and balance. When the rule is not followed, it is nothing less than a violation of constitutional principles, a violation that is not mitigated – but aggravated – when the people of the States have expressed their will on a subject so sensitive and profound as the one at issue here.

The court of appeals failed to follow the cardinal rule, and improperly struck down a Nebraska statute banning partial birth abortion. This Court should correct the error, accept the narrowing construction offered by Nebraska and uphold the statute as constitutional. Moreover, the Court should use this case as an opportunity to undergird constitutional principles by adopting

corollaries to the cardinal rule that will promote restraint and balance in future controversies.

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